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NOT TO BE PUBLISHED OPINION

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RENDERED: DECEMBER 18, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2012-SC-000432-MR

HELENA WEATHERSPOON — APPELLANT

V.

ON APPEAL FROM HICKMAN CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
NO. 10-CR-00010

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING IN PART AND REVERSING AND VACATING IN PART

This appeal stems from the February 27, 2010 arrest of Appellant, Helena Weatherspoon. A confidential informant notified Steve Hendley, a Pennyrile Narcotics Drug Task Force detective, that Appellant would be driving through the area and transporting a significant amount of cocaine on the night in question. The informant provided Detective Hendley with a description of Appellant's vehicle, which he relayed to other local law enforcement officers. As expected, Detective Hendley spotted Appellant's car shortly after midnight. Detective Hendley notified Hickman County Deputy Sheriff Daniel Wyant of the vehicle's whereabouts, at which point Deputy Wyant began following the vehicle. Deputy Wyant noticed that the vehicle had a temporary registration tag that was partially covered. Based on this traffic violation, Deputy Wyant

stopped Appellant's vehicle. Appellant's then fifteen year-old niece, Tina,[1] was sitting in the front passenger seat.

Deputy Wyant quickly uncovered that Appellant was on parole in Missouri and had no permission to be in Kentucky. Consequently, Deputy Wyant removed Appellant from her vehicle and detained her in the back of his police cruiser. Tina was also removed from Appellant's vehicle. At some point during Appellant's detainment, she consented to a search of her vehicle. The initial search failed to uncover any drugs or contraband. As a result, Detective Hendley requested a K-9 drug-sniffing dog to be brought to the scene to inspect the vehicle. The K-9 was brought from a neighboring county, so it took approximately twenty to thirty minutes for the dog to arrive. After sniffing the car, the K-9 alerted the officers to the front passenger seat and console area. Detective Hendley then informed Tina that he was going to walk the K-9 around her in order to determine if any drugs were on her person. Tina immediately confessed that she was hiding drugs in her underwear for Appellant. The drugs turned out to be 5.3 grams of cocaine.

A Hickman Circuit Court grand jury indicted Appellant on one count of unlawful transaction with a minor in the first degree; trafficking in a controlled substance in the first degree, second offense; and one count of being a persistent felony offender ("PFO"). Appellant's trial lasted only one day and occurred on March 22, 2011. During the trial, the jury heard conflicting versions of what transpired on the night in question. Appellant denied that the

[1] A pseudonym is being used to protect the anonymity of the juvenile.

cocaine found on Tina belonged to her. Appellant also denied having any knowledge that Tina had the drugs in her vehicle. Tina, on the other hand, stated that Appellant gave her the drugs and requested that she hide them on her person.

A Hickman Circuit Court jury found Appellant guilty of one count of unlawful transaction with a minor in the first degree; possession of a controlled substance in the first degree, first offense; and being a PFO in the first degree. The jury recommended a sentence of ten years imprisonment for the unlawful transaction with a minor conviction and one year imprisonment for the possession of a controlled substance conviction, both to run concurrently. Appellant's sentence was enhanced to twenty years imprisonment by virtue of her PFO conviction. Appellant now appeals her judgment and sentence as a matter of right pursuant to Ky. Const. § 110(2)(b).

Appellant raised several alleged errors in this appeal, only two of which were preserved before the trial court. Consequently, before we address Appellant's numerous complaints of error, we feel compelled to first re-emphasize the high standard by which we investigate palpable error pursuant to RCr 10.26. "When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth,* 207 S.W.3d 1, 5 (Ky. 2006). Furthermore, "[a] party claiming palpable error must show a probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process

of law." *Chavies v. Commonwealth*, 374 S.W.3d 313, 322-23 (Ky. 2012); *see also, Martin,* 207 S.W.3d at 4. With this high standard in mind, we turn to Appellant's arguments.

Jury Questions

Appellant's first assignment of error concerns the trial court's procedure in answering questions of the jury during deliberations. Appellant maintains that the trial court's procedure did not conform to RCr 9.74, resulting in a violation of her rights to due process and a fair trial as guaranteed by the 6th and 14th Amendments of the United States Constitution and Section 11 of the Kentucky Constitution. On four separate occasions, the jury presented questions to the trial court during its deliberations. Each question was sent to the trial judge in writing. The trial judge failed to bring the jury to the courtroom in order to answer the questions on the record. There is no oral record of what the trial judge specifically stated to the jury when answering its questions. Our only record is comprised of four separate pages which include the jury's hand written question and the trial judge's hand written explanation of his response. At no point did Appellant object to the trial court's process in answering the jury's questions.

The jury's first and second questions occurred during the guilt phase of the underlying charges. First, the jury asked the trial court: "Did the dept. sheriff see the car early in the day? Where was the teenagers [sic] purse in the car?" The trial judge, along with the prosecutor and defense attorney, entered the jury room and explained that he could not answer jurors' specific

questions; rather they would have to rely on their own memories. The second jury question inquired as to where the jury should indicate on the verdict form that Appellant's sentences were to run concurrently or consecutively. Just as with the first question, the trial judge and both attorneys entered the jury room to respond to the inquiry. However, once in the deliberation room, the parties were told that the jury had already answered its own question.

The third and fourth jury questions were presented during the PFO guilt and sentencing phase.

They prove to be more problematic.

In regards to the third question, the jury stated, in reference to the PFO charge: "We can't make an agreement unanimously." The trial judge, both attorneys, and—for some inexplicable reason—prosecution witness Deputy Wyant entered the jury room. The trial judge "advised the jury to take all the time they needed &/or return when they wished to the courtroom." The fourth and final jury question stated: "100% guilty. 20 yrs to [sic] much time." This time the trial judge, both attorneys, and the bailiff entered the jury room. The judge explained to the jurors that he could not comment on their question and instead referred them to the jury instructions.

At the outset of our analysis, we must note that Appellant is not claiming that her counsel was not given an opportunity to be heard, nor does she maintain that her presence would have been useful when her counsel and the trial judge were formulating answers to the jury's questions. Likewise, Appellant does not argue that the substance of the trial judge's answers was in

error or that they constituted ex parte communications. Therefore, it appears that Appellant's sole argument is that, since the trial judge failed to follow the procedural requirements expressed in RCr 9.74, reversal is required. We disagree.

RCr 9.74 states the following:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

We have long held that once deliberations have begun, all questions presented by the jury must be responded to on the record, in open court, and in the presence of the accused. For example, in *Lett v. Commonwealth,* our predecessor Court determined that it was reversible error for a stenographer to read portions of trial testimony back to the jury during its deliberations without the defendant's counsel present. 284 Ky. 267, 144 S.W.2d 505 (1940); *see also Welch v. Commonwealth,* 235 S.W.3d 555 (Ky. 2007).

We have no doubt that allowing a prosecuting witness into the jury room during deliberations is a violation of RCr 9.74. Therefore, we find that the trial judge's procedure in answering the jury's questions was in error.

Notably, the trial judge by no means provided the jury with a substantive answer to any given question. The judge merely told the jurors to take their time, refer to their own memories, or look to the jury instructions. Indeed, not all jury inquiries "require or allow for a substantive response, and [] some will

call for responses that need little discussion." *Malone v. Commonwealth,* 364 S.W.3d 121, 133 (Ky. 2012); *see also St. Clair v. Commonwealth,* 140 S.W.3d 510, 542 (Ky. 2004). In essence, we have no quarrel with the answers given by the trial court, just the location in which they were given. We would not be wrestling with this issue had the trial court followed RCr 9.74 and brought the jury into the courtroom.

We do not find that the judge's trips to the jury room in the guilt deliberation, though error, to be a manifest injustice nor palpable error. Only the judge, prosecutor and defense lawyers were present. However, Deputy Wyant's presence in the jury room at the sentencing and PFO deliberations was highly prejudicial. We note that he was not just a peripheral witness but the main investigative witness for the prosecution. Here the error rises to the level of manifest injustice and palpable error rendering Appellant's trial unfair. Thus, we must remand this case back to the trial court in order for it to conduct a new sentencing and PFO stage of the trial.

Hearsay Testimony

Appellant next complains that four inadmissible hearsay statements were improperly introduced during the testimony of two prosecuting witnesses. Appellant only objected to one of the alleged hearsay statements, which the trial court properly sustained.

The first two complained of statements were made when Detective Hendley and another investigating officer, Deputy Hopper, testified that their investigation was a result of a confidential tip that Appellant would be

transporting drugs on the day in question. We find that these statements qualify as hearsay since they were provided, at least in part, to prove the truth of the matter asserted, i.e, that Appellant was transporting drugs. While this testimony was also likely elicited to explain the actions of the officers, we do not believe these statements fall within the purview of *Sanborn v. Commonwealth,* 754 S.W.2d 534 (Ky. 1988) (overruled in part on other grounds in *Hudson v. Commonwealth,* 202 S.W.3d 17, 22 (Ky. 2006)). In *Sanborn*, we held that hearsay statements may sometimes be admissible in order to explain the actions of police officials. *Id.* at 541. However, such testimony would only be admissible if an issue concerning the actions of the officers was first raised. *Id.*

Despite our finding that Detective Hendley's and Deputy Hopper's statements were inadmissible hearsay, such error is not palpable. Deputy Wyant, who testified prior to Detective Hendley and Deputy Hopper, explained that he stopped Appellant's vehicle due to an obstructed license tag, in addition to a tip that she was transporting drugs. Therefore, the subsequent testimony of Detective Hendley and Deputy Hopper concerning the tip could not have prejudiced Appellant in any real way. *See White v. Commonwealth,* 5 S.W.3d 140, 142 (Ky. 1999) (holding admission of hearsay testimony harmless error because it was cumulative of other trial testimony).

Appellant's third alleged instance of hearsay testimony occurred when Detective Hendley testified that, upon removing Tina from Appellant's vehicle, she confessed to having drugs hidden in her underwear. Appellant did not

object to this testimony. Regardless of whether this statement is inadmissible hearsay, such information was cumulative of other evidence elicited during the trial, rendering its admission harmless. *See Brewer v. Commonwealth,* 206 S.W.3d 343, 352 (Ky. 2006). Specifically, Tina testified that she admitted to Detective Hendley that she hid the cocaine in her underwear when she and Appellant were pulled over.

Appellant's fourth and final claim of hearsay testimony occurred when Deputy Hopper testified that, upon interviewing Tina, she told her that Appellant was the individual who gave her the cocaine. Appellant objected to this statement and the trial court sustained the objection. Appellant did not request an admonition, nor did she request any other relief. As we have consistently held, "a party must timely inform the court of the error and request the relief to which he considers himself entitled. Otherwise, the issue may not be raised on appeal." *E.g., West v. Commonwealth,* 780 S.W.2d 600, 602 (Ky. 1989). As a result, we must assume Appellant's counsel was satisfied with the trial court's exclusion of Deputy Hopper's testimony. *See Meredith v. Commonwealth,* 164 S.W.3d 500, 506 (Ky. 2005).

Evidence of Prior Indictment

Appellant also maintains that her right to a fair trial was hindered by the improper questioning of Appellant's mother during the sentencing phase of the underlying charges. In particular, while Appellant's mother was testifying, the prosecutor began inquiring about a 2005 indictment against Appellant. At no point did Appellant object to this line of questioning. Ultimately, the jury

recommended the minimum sentence permitted by law. Therefore, we decline to address this issue since it is apparent that no manifest injustice resulted.

Mistrial

The Appellant's allegation that a mistrial should have been declared during alleged irregularities during the jury's deliberation at the PFO and sentencing stage, are made moot by our reversal of the sentencing phase of the trial.

Retroactivity of House Bill 463

Appellant next requests that we retroactively apply House Bill 463 ("HB 463") to Appellant's sentence. On May 5, 2011, the day the trial court sentenced Appellant, first-degree possession of a controlled substance, as proscribed in KRS 218A.1415, required a sentence of one to five years imprisonment. With the enactment of HB 463, which became effective June 8, 2011, a person convicted of first-degree possession of a controlled substance is now subject to a maximum term of three years imprisonment. Appellant also claims that HB 463 prohibits a possession of a controlled substance conviction to be used for PFO enhancement. For obvious reasons, retroactive applicability was not presented to the trial court. Nonetheless, "sentencing issues may be raised for the first time on appeal[.]" *Cummings v. Commonwealth,* 226 S.W.3d 62, 66 (Ky. 2007).

KRS 446.080(3) specifies that "[n]o statute shall be construed to be retroactive, unless expressly so declared." This Court has stated that "retroactive application of statutes is improper unless the General Assembly

'clearly manifests its intent' for the statute in question to have retroactive application." *Commonwealth ex rel. Conway v. Thompson,* 300 S.W.3d 152, 166 (Ky. 2009) (quoting *Baker v. Fletcher,* 204 S.W.3d 589, 592 (Ky. 2006)). We find no language in HB 463 that refers, or even indicates, that the law is to be retroactively applied. Furthermore, Appellant was sentenced "in accordance with the law which existed at the time of the commission of the offense . . . ." *Lawson v. Commonwealth,* 53 S.W.3d 534, 550 (Ky. 2001). Therefore, we decline to retroactively apply HB 463.

Suppression Motion

Appellant asserts that the trial court erred in failing to grant her motion to suppress the cocaine found on Tina's person. A suppression hearing was held on January 4, 2011. Grounds for Appellant's motion were that (1) the stop was pretextual; and (2) the length of the detention of Tina was unreasonable. The trial court entered an order denying Appellant's motion to suppress on January 19, 2011. The trial court held that law enforcement had reasonable and articulable suspicion to stop Appellant's vehicle. Furthermore, since the K-9 was brought from another county, the resulting detention was not unreasonable or unduly prolonged. For the reasons set forth below, we affirm the trial court's ultimate denial of Appellant's motion to suppress, but on different grounds.

In reviewing a trial court's denial of a motion to suppress, we ensure that the trial court's factual findings are not clearly erroneous, after which we conduct de novo review of the trial court's applicability of the law to the facts.

Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998) (citing *Ornelas v. United States*, 517 U.S. 690, 697 (1996)). Having found that the trial court's factual findings are supported by the evidence and testimony presented during the suppression hearing, we turn to the trial court's application of the law.

First, we find Appellant's pretextual argument unpersuasive. We have held that "an officer who has probable cause to believe a civil traffic violation has occurred may stop [the] vehicle regardless of his or her subjective motivation in doing so." *Wilson v. Commonwealth*, 37 S.W.3d 745, 749 (Ky. 2001) (citing *United States v. Akram*, 165 F.3d 452, 455 (6th Cir.1999)). Deputy Wyant testified that he stopped Appellant's vehicle due to a traffic violation; particularly, the vehicle had a temporary tag that was partially obscured. Despite the fact that Deputy Wyant was also aware of the confidential informant's tip and the likelihood that drugs were in the vehicle, he nonetheless had a valid reason warranting the stop.

Similarly, we can quickly dispose of Appellant's second argument in support of her motion to suppress. It is true that the use of drug-detecting dogs can constitute an unreasonable search when the duration of the stop persists beyond the reasonable amount of time required to effectuate the purpose of the stop. *E.g., Epps v. Commonwealth*, 295 S.W.3d 807, 810 (Ky. 2009). However, Appellant's argument is framed as such that she is complaining of Tina's continued detention, not her own. Indeed, Appellant's detention was completely reasonable as she was being detained for a possible parole violation.

In cases challenging the duration of an investigatory stop, we have found that a passenger in a stopped vehicle has standing to challenge the length of his or her *own* detention; however, the reverse is not true. *See Epps,* 295 S.W.3d at 810. Thusly, Appellant has no standing to assert Tina's Fourth Amendment rights. *See, e.g., Rakas v. Illinois,* 439 U.S. 128 (1978) (passengers cannot challenge the constitutionality of a search of another's vehicle); *Rawlings v. Kentucky,* 448 U.S. 98 (1980) (defendant cannot dispute the search of his girlfriend's purse). Therefore, while we disagree with the court's reasoning, we agree with its ultimate denial of Appellant's motion to suppress. *See McCloud v. Commonwealth,* 286 S.W.3d 780, 786, n.19 (Ky. 2009) ("[I]t is well-settled that an appellate court may affirm a lower court for any reason supported by the record.").

Conclusion

Based upon the foregoing, the Hickman Circuit Court's guilty verdict is hereby affirmed; the sentencing phase of the trial is reversed and vacated; and the imposition of costs is vacated. Accordingly, this matter is remanded to the Hickman Circuit Court for proceedings consistent with this opinion.

All sitting. Abramson, Cunningham, Noble, Scott, and Venters, JJ., concur. Keller, J., dissents by separate opinion in which Minton, C.J., joins.

KELLER, J. DISSENTING: I respectfully dissent from the majority's holding that the judge's actions during jury deliberations in the guilt phase did not rise to the level of palpable error. Therefore, I would reverse and remand for a new trial.

As noted by the majority, during deliberations the jury sent pieces of paper to the trial court containing questions and/or statements. The court did not bring the jury to the courtroom to address these questions/statements, and the record does not indicate what, if any, discussion took place between the court and the parties regarding the questions/statements. Furthermore, the record does not indicate to what extent, if at all, the Appellant was consulted regarding the questions and the court's responses. However, it is clear from the court's handwritten notes that Appellant was not present when the judge responded to the jury's questions.

"As set forth in Section 11 of the Kentucky Constitution and the Sixth Amendment of the U.S. Constitution, a criminal defendant has the right to be present at every critical stage of the proceedings against him." *Commonwealth v. B.J.*, 241 S.W.3d 324, 326 (Ky. 2007). As the majority implies, the fact that a trial judge communicated with the jury outside a defendant's presence does not necessarily constitute the deprivation of a constitutional right. ("The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *United States v. Gagnon*, 470 U.S. 522, 526 (1985). (Citation omitted.)) However, a defendant's presence is "a condition of due process to the extent that a fair and just hearing would be thwarted by his absence . . . ." *Id.* at 526. (Citation omitted.) In recognition of the significance of a defendant's right to be present our criminal rules provide that:

> No information requested by the jury or any juror after the jury has retired for deliberation shall be given except in open court in the presence of the defendant (unless the defendant is being tried in absentia) and the entire jury, and in the presence of or after reasonable notice to counsel for the parties.

RCr 9.74.

When a jury asks a substantive question and the court responds, I believe that is a critical stage of the proceedings and due process, as well as RCr 9.74, requires the defendant's presence.[2] A defendant may very well be able to glean from the question what factors the jury finds to be significant. With that information, the defendant could then determine whether to proceed to verdict or to attempt to negotiate a plea agreement. Furthermore, a defendant should be present to hear and observe the judge's response. While the written word can convey the language used, it cannot convey what inflection the judge used or the judge's body language, nor can it convey the jurors' reactions. The preceding are all essential to understanding what transpired and to ensuring Appellant received a fair and just hearing.

Furthermore, while I agree with the majority that the statements the judge indicated he made to the jury were not necessarily inappropriate I am troubled by the trial court's failure to make an adequately reviewable record. The only record this Court has of what transpired in the jury room is the judge's cryptic-handwritten notes. This Court has no record about what

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[2] As we noted in *Martin v. Commonwealth*, 2010-SC-000830-MR, 2011 WL 6826399 (Ky. Dec. 22, 2011) the defendant's presence was not necessary when the judge told the jurors about dinner plans and that they could make brief phone calls to their homes.

transpired before that. The majority states that "in all probability" Weatherspoon waived her right to be present and it is "likely that all parties agreed to the trial court's procedures." The reliance on probability and likelihood is precisely the problem RCr 9.74 is designed to prevent. Trial courts should not be permitted, if not encouraged, to violate the mandatory language in RCr 9.74, which is what the majority opinion does. This case presents this Court with an opportunity for us to educate our trial courts that, with Constitutional rights at stake, "shall" means shall, not "should."

The trial court's actions resulted in a nearly silent record on the issue in question and in Appellant being excluded from a crucial stage of the proceedings. Therefore, I disagree with the majority's holding that the judge's actions during the guilt phase of the trial did not rise to the level of palpable error, and I would reverse the entire judgment and remand for additional proceedings.

Minton, C.J. joins.

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